

**Letter of Findings: 04-20110243
Sales and Use Tax
For the Years 2008 and 2009**

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ISSUE

I. Sales and Use Tax – Imposition.

Authority: IC § 6-2.5-1-1 et seq.; IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-4-1; IC § 6-8.1-3-12; IC § 6-8.1-5-1; [45 IAC 2.2-3-13](#); [45 IAC 2.2-3-27](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974); Rhoades v. Indiana Dep't of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466 (Ind. Tax Ct. 1993); In re J.S., 906 N.E.2d 226 (Ind. Ct. App. 2009); Sales Tax Information Bulletin 20 (October 2009); Sales Tax Information Bulletin 28S (December 2009).

Taxpayer protests the assessments on sales and purchases of tangible personal property.

STATEMENT OF FACTS

Taxpayer is an Indiana company which provides its customers car and truck maintenance and repair services. The Indiana Department of Revenue ("Department") conducted a sales/use tax audit for tax years 2008 and 2009. The audit utilized two different approaches in examining Taxpayer's accounts and records. Due to the volume of Taxpayer's sales records, the Department utilized a sample selected from Taxpayer's 2008 sales records and a projection method to determine Taxpayer's sales tax liabilities. To determine Taxpayer's use tax liabilities, the Department reviewed "all purchase invoices, except purchase invoices for inventory."

Pursuant to the audit, the Department determined that Taxpayer failed to collect and remit sales tax on some transactions. The Department's audit also assessed use tax because Taxpayer did not pay sales tax or self-assess and remit the use tax for certain purchases of tangible personal property, which Taxpayer used for its business.

Taxpayer timely protested the assessments. A hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales and Use Tax – Imposition.

DISCUSSION

The Department's audit assessed Taxpayer additional sales tax because Taxpayer did not collect sales tax at the time of the transactions. The Department also assessed Taxpayer additional use tax because Taxpayer did not pay sales tax or use tax for certain tangible personal property it purchased and used in Indiana.

Taxpayer, to the contrary, first claimed that certain retail transactions were exempt from sales tax and, therefore, it was not responsible for collecting and remitting the sales tax. Taxpayer also asserted that its purchases were not subject to use tax.

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). Indiana also imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). "Use" means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a). The use tax is functionally equivalent to the sales tax. See Rhoades v. Indiana Dep't of State Revenue, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002).

By complementing the sales tax, the use tax ensures that non-exempt retail transactions (particularly out-of-state retail transactions) that escape sales tax liability are nevertheless taxed. Id.; USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466, 468–69 (Ind. Tax Ct. 1993). The use tax ensures that, after such goods arrive in Indiana, the retail purchasers of the goods bear their fair share of the tax burden. To trigger imposition of Indiana's use tax, tangible personal property must (as a threshold matter) be acquired in a retail transaction. Id. A taxable retail transaction occurs when (1) a party acquires tangible personal property as part of its ordinary business for the purpose of reselling the property; (2) that property is then exchanged between parties for consideration; and (3) the property is used in Indiana. See IC § 6-2.5-1-2; IC § 6-2.5-4-1(b), (c); IC § 6-2.5-3-2(a).

An exemption from use tax is granted for transactions where the sales tax was paid at the time of purchase

pursuant to IC § 6-2.5-3-4. There are also additional exemptions from sales tax and use tax. A statute which provides a tax exemption, however, is strictly construed against the taxpayer. *Indiana Dep't. of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." *Id.* at 100-101.

Since Taxpayer protested the sales and use tax separately, this Letter of Findings examines Taxpayer's arguments and addresses Taxpayer's protest of sales tax and use tax separately, as follows:

A. Sales Tax.

The Department's audit assessed Taxpayer additional sales tax because Taxpayer did not collect sales tax at the time of the sales. Taxpayer, to the contrary, asserted that those transactions were exempt from sales tax. Taxpayer also asserted that the audit erroneously assessed sales tax on one of the transactions, reference number 0139073, for which Taxpayer had collected sales tax from its customer and remitted to the Department.

Indiana imposes a sales tax on retail transactions. IC § 6-2.5-2-1 states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

IC § 6-2.5-4-1, in pertinent part, states:

- (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:
 - (1) acquires tangible personal property for the purpose of resale; and
 - (2) transfers that property to another person for consideration.
- (c) For purposes of determining what constitutes selling at retail, it does not matter whether:
 - (1) the property is transferred in the same form as when it was acquired;
 - (2) the property is transferred alone or in conjunction with other property or services; or
 - (3) the property is transferred conditionally or otherwise.

Accordingly, Taxpayer is a retail merchant and, therefore, is responsible for collecting and remitting the sales tax.

IC § 6-8.1-5-1(b) further states:

If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department.

In this instance, during the audit period and pursuant to IC § 6-8.1-3-12(b), the Department utilized statistical sampling to determine Taxpayer's sales tax liability. Taxpayer argued that certain transactions within the sample population were exempt from sales tax because its customers were qualified for exemptions outlined in the Indiana law. The Department thus allowed Taxpayer additional time to submit additional documentation, such as special exemption certificates. Taxpayer, however, failed to timely submit the properly executed special exemption certificates before the audit was concluded.

Subsequently after the administrative hearing, Taxpayer submitted additional documentation to support its protest. Upon reviewing Taxpayer's additional documentation, the Department determined that Taxpayer has provided sufficient documentation to demonstrate that one of the transactions – "11/12/2008, 0169399, XXXXX Transportation S, parts, \$99.07" – listed on page 18 of the Audit Summary was exempt. Thus, the Department will remove this transaction from the sampling population in a supplemental audit.

The Department, however, is not able to agree that Taxpayer's documentation was sufficient to support the claim that the remaining transactions were exempt from sales tax. Specifically, Taxpayer asserted that it was not responsible for collecting sales tax from certain individual customers because a third party agreed to reimburse Taxpayer on behalf of those individual customers and the third party was a company claiming exemptions. To the contrary, Taxpayer's documentation demonstrates that it sold and transferred tangible personal property to those individual customers, who were not exempt. Taxpayer thus should have collected the sales tax. Also, Taxpayer failed to provide properly executed special exemption certificates for certain transactions. Thus, Taxpayer remained responsible for the sales tax concerning those transactions.

Additionally, Taxpayer provided a copy of an invoice, reference number 0139073, asserting that the audit erroneously assessed sales tax on the transaction for which Taxpayer had collected and remitted the sales tax. However, Taxpayer's reliance is misplaced. Upon reviewing Taxpayer's documentation, this invoice showed that the transaction occurred on December 29, 2005, not November 30, 2008. The same invoice also showed that the transaction was for a different customer in a different amount, which was listed in the audit summary. Thus, this invoice is beyond the scope of the audit because, apart from the reference number, none of the information matched the transactions listed in the audit summary.

In an attempt to reconcile this discrepancy, the Department further reviewed Taxpayer's documentation and found that Taxpayer's "Repair Order Sales Ledger, Page 3" showed that an entry of reference number 0169073

contained (1) the correct date of "11/30/2008," (2) the same customer name of "XXX XXX Logistics," and (3) the correct calculation/description of "parts less discount" in the amount of \$1,457.40, which was "(1826.46-369.06)", listed in the audit summary under reference number 0139073. Obviously, the audit summary contained a typo concerning one digit of the reference number.

Even if, the audit summary contains a typo concerning the reference number, it was obviously a clerical or scrivener's error and it is harmless. In re J.S., 906 N.E. 2d 226, 235 (Ind. Ct. App. 2009) (upholding the trial court's order to terminate the parental rights because the trial court correctly applied the proper standard complying with the termination statute and finding that the court's "use of the word 'have' for 'will' is merely a scrivener's error and does not warrant reversal of the termination decision.") Taxpayer's own records clearly provide details of the November 30, 2008, transaction which were consistent with the details listed in the audit summary. Therefore, the audit summary correctly assessed the sales tax on the November 30, 2008, transaction and Taxpayer remained responsible for the sales tax concerning the November 30, 2008, transaction, in the amount of \$1,457.40.

In short, Taxpayer has provided sufficient documentation demonstrating that one of the transactions was exempt from sales tax. The Department will remove the November 12, 2008, transaction in the amount of \$99.07 from the sampling population and recalculate Taxpayer's sales tax liability. Taxpayer, however, did not provide sufficient documentation demonstrating that the remaining transactions were exempt from sales tax and, therefore, remained responsible for the sales tax.

B. Use Tax.

The Department assessed additional use tax because Taxpayer purchased and used certain tangible personal property, such as a computer, a desk, and shop supplies, without paying sales tax at the time of its purchases or self-assessing and remitting the use tax accordingly. Taxpayer, to the contrary, asserted that it was not responsible for the use tax.

IC § 6-2.5-3-2(a) provides:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

[45 IAC 2.2-3-13](#) illustrates:

Tangible personal property, purchased in Indiana or elsewhere in a retail transaction from a retail merchant, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax measured by the gross retail income received from such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

[45 IAC 2.2-3-27](#) further provides:

The person who stores, uses or consumes tangible personal property in Indiana may avoid paying the use tax to the Department if such person retains for inspection by the Indiana Department of Revenue a receipt evidencing payment of the tax.

As mentioned above, any purchase and use of tangible personal property in Indiana generally is subject to the Indiana use tax. An exemption from use tax is granted for transactions where the sales tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4. There are also additional exemptions from sales tax and use tax. A statute which provides a tax exemption, however, is strictly construed against the taxpayer. *RCA Corp.*, 310 N.E.2d at 97. "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." *Id.* at 100-101.

1. Capital Purchases.

The Department assessed additional use tax on Taxpayer's two purchases, which Taxpayer classified as "capital purchases"—a computer, in the amount of \$771.75, and a desk, in the amount of \$1,969.00.

Taxpayer first asserted that it purchased the computer on-line and paid the sales tax at the time of the purchase. To support its protest, Taxpayer submitted a copy of its on-line purchase order, in the total amount of \$571.40, including shipping and tax. Taxpayer also referred to the Department's Sales Tax Information Bulletin 20 (October 2009), 20091125 Ind. Reg. 045090898NRA, claiming that its purchase of the desk was not subject to the use tax because "the auction was held on the owners [sic] place of business and not at the auction house no sales tax was owed."

Taxpayer is mistaken. The Department's audit found that Taxpayer purchased the computer at issue on January 22, 2008, in the amount of \$771.75, without paying sales tax. Upon further reviewing Taxpayer's supporting documentation, however, it showed that Taxpayer purchased several computer accessories from the on-line vendor on "August 26, 2009," in the total amount of "\$571.40." In this instance, Taxpayer protested the Department's assessment of the January 22, 2008, purchase, but its documentation did not support its assertion that it had paid sales tax for the January 22, 2008, purchase.

As to the purchase of the \$1,969.00 desk, Taxpayer merely attached a copy of the Department's Sales Tax Information Bulletin 20 without any supporting documentation. Thus, given the totality of the circumstances, in the absence of other supporting documentation to substantiate Taxpayer's assertion, the Department is not able to agree that Taxpayer met its burden demonstrating that it was not responsible for the use tax.

In short, Taxpayer did not provide sufficient documentation demonstrating that sales tax was paid at the time of the purchases; therefore, Taxpayer remains responsible for the use tax of the \$771.75 computer and the \$1,969.00 desk.

2. Purchases of Parts and Shop Supplies.

The Department assessed Taxpayer use tax on the purchases of parts, including a burner motor and parts for lawn mowers, as well as consumable supplies, including degreasers and cleaner (Consumable Supplies) which Taxpayer used to perform the truck and car repairs.

a. Purchases of Parts.

Taxpayer first asserted that it purchased and, subsequently, sold three items to itself, including a burner motor and parts for its lawn mowers, which sales tax was collected at the time of the transactions. That is, Taxpayer sold the items to itself and collected the sales tax from itself. Thus, Taxpayer claimed that it was not responsible for the use tax because sales tax was collected. To support its protest, Taxpayer simply provided its own invoices showing that sales tax was collected on the items.

Taxpayer is mistaken. Upon reviewing Taxpayer's documentation, its invoices alone did not support its assertion. Specifically, Taxpayer's documentation did not match any described transactions listed in the Department's audit summary. Taxpayer also failed to provide additional documentation to corroborate its claim. Thus, the Department is not able to agree that Taxpayer met its burden of proof demonstrating that it paid sales/use tax on its purchases of the burner motor and parts for its lawn mowers.

b. Purchases of Consumable Supplies.

The Department assessed Taxpayer use tax on its purchases of Consumable Supplies which Taxpayer used to perform the truck and car repairs. Taxpayer, claiming that it was not responsible for the use tax, in relevant part, stated that:

Sales tax was collected and submitted as taxable parts sales to the customers. The sale of these parts are shown and tracked as "Shop" sales. The amount charged to the customer is based on a percentage of the labor and parts on an invoice.

Taxpayer submitted a summary report to support its assertion that "[t]he tax was collected and submitted as part of the monthly sales tax payment."

Taxpayer is mistaken. The Department's Sales Tax Information Bulletin 28S (December 2009), 20100127 Ind. Reg. 045100029NRA, states, in pertinent part:

IV. SHOP SUPPLIES CONSUMED BY A DEALER

Consumable supplies used by a dealer, such as masking paper and tape, oil dry, sandpaper, buffing pads, rags and cleaning supplies, to repair and service motor vehicles are not exempt purchases by the dealer. The dealer should pay sales tax on these types of purchases or remit use tax on the cost of these purchases on the dealer's sales tax returns. The purchaser (dealer) becomes the final consumer of such items because its customer does not become the owner of such consumable supplies. Although the dealer may charge the customer a fee for the dealer's consumption of these materials, **such items are not being sold to the customer in a retail transaction and sales tax is not to be collected from the customer. (Emphasis added).**

Thus, Taxpayer was the user of those items and was responsible for sales/use tax pursuant to [45 IAC 2.2-3-13](#) and the Department's Sales Tax Information Bulletin 28S. Since Taxpayer did not pay sales tax at the time of the purchases, use tax is properly imposed.

FINDING

Taxpayer's protest concerning the transaction of "11/12/2008, 0169399, XXXXX Transportation S, parts, \$99.07" is sustained. The Department will remove this transaction from the sampling population and recalculate the sales tax due in a supplement audit. Taxpayer's remaining protest, however, is respectfully denied.

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